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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of	)	
Sections 12 and 19 of	)	
the Cable Television	)	MM Docket No. 92-265
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

PETITION FOR CLARIFICATION AND RECONSIDERATION

DISCOVERY COMMUNICATIONS, INC.

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TABLE OF CONTENTS

Summary

Discovery Communications, Inc. ("Discovery") hereby petitions the Commission to reconsider and clarify certain aspects of its First Report and Order in MM Docket No. 92-265. Discovery first submits that an exception to the Program Access Rule should be crafted to exempt from the rule program services of an educational or informational nature. Congress and the Commission both have expressed a desire to promote the availability of educational/informational programming, and it would further that goal to encourage investment in such services, rather than discouraging investment, as the present rules do.

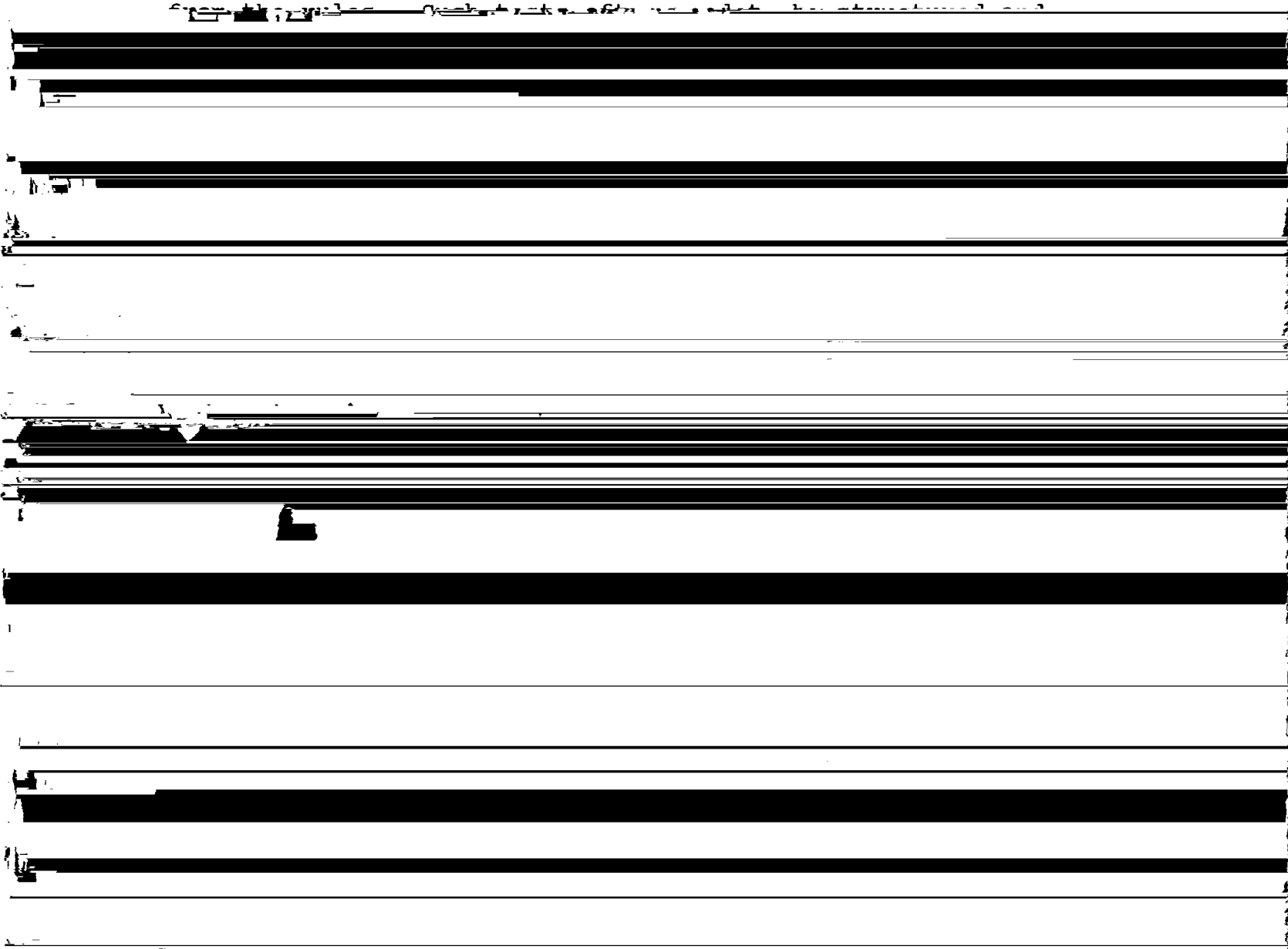
Next Discovery requests imposition of a higher burden on cable operators claiming discrimination against a vertically integrated programmer than the burden imposed on alternative technologies. The simple "some overlap" standard would allow cable operators to obtain contract terms that they would be unable to negotiate at arms length in the open marketplace. A "substantial overlap" test would be more appropriate.

Further, Discovery asks the Commission to afford more effective guarantees of confidentiality than currently provided. While Discovery acknowledges the importance in the complaint process of access to such documents, some types of proprietary information is so sensitive that it would afford competitors an unfair advantage in future business dealings. Accordingly, where

good cause is shown, access should be allowed only to complainants' attorneys and the Commission's staff.

Moreover, Discovery proposes a middle ground approach to the application of the Commission's new rules to preexisting program distribution contracts. The needs of alternative technology distributors and the investment of programmers both could be protected by requiring reformation only of those contracts that significantly harm the distributor's ability to compete in the marketplace.

Finally, Discovery requests the Commission expressly to exempt marketing and technology experiments and demonstrations



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PETITION FOR CLARIFICATION AND RECONSIDERATION

Discovery Communications, Inc. ("Discovery"), by its attorneys and pursuant to 47 CFR § 1.429, hereby petitions the Commission to reconsider and clarify certain aspects of the First Report and Order in MM Docket No. 92-265, FCC 93-178 (rel. Apr. 30, 1993), which implements Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992) (the "1992 Cable Act" or the "Act").[1]

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[1] As set forth in Discovery's initial comments in this proceeding, Discovery has challenged the constitutionality of various provisions of the 1992 Cable Act, including Section 19. Comments of Discovery in MM Docket No. 92-265 at 2-3. Discovery submits that Section 19 unconstitutionally targets programmers affiliated with cable operators for disfavored treatment. This petition for reconsideration is submitted without prejudice to Discovery's constitutional challenge to Section 19.

I. An Exception to the Program Access Rules Should Be Fashioned to Promote the Provision of Programming of an Educational or Informational Nature

The existing program access rules apply to satellite cable programmers if a cable operator has an attributable interest in the program service. For purposes of the rules, a cable operator is deemed to "have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programmer, whether voting or non-voting." Order at ¶ 31. In footnote 19 of the Order, however, the Commission indicated that it might revisit its decision in certain circumstances. Id. at ¶ 33, n.19.

Discovery submits that it would be appropriate to fashion a [redacted]

requirement. See, e.g., Policies and Rules Concerning Children's Television Programming, FCC 91-248 (rel. Aug. 26, 1991); see also 47 USC § 396(a)(1) (it is in the public interest to devote public funds to encourage the use of public broadcasting stations for instructional and educational purposes).

Given this consistent desire of both Congress and the Commission to promote the availability of programming of an educational or informational nature, the Commission should design its rules to encourage investment in these services -- without undermining the objectives Congress sought to promote in the program access provisions of the 1992 Cable Act.

In fact, common ownership of cable systems and an educational/informational program service should have little effect on the ability of alternative technology distributors to compete with cable. The mission of such services is not just to offer programming, but to make the programming available as widely as possible. The historic operations of these educational/informational services (as exemplified by detailed data supplied on behalf of The Discovery Channel and the Learning Channel) demonstrates a very high level of even-handedness in dealings with all distribution technologies. See, e.g., Discovery Notification of Permitted Ex Parte Presentation, filed

availability of satellite programming services to "alternative" distribution technologies or on the development of such technologies.[2] Such services, however, are exactly the type that need the support of distributors. The rules adopted by the Commission, however, affirmatively discourage investment and support in such services.

Accordingly, Discovery submits that the Commission should exempt from its program access rules any program service that supplies programming of an educational or informational nature. Such an exemption would help further the establishment and distribution of educational and informational programming in furtherance of the Congressional goal.

II. Because Cable Operators Traditionally Have Not Been Discriminated Against in the Acquisition of Programming, the Commission Should Impose a Higher Burden on Cable Operators Seeking to Make a Claim of Discrimination

Under the Commission's program access rules a complainant may bring a claim of discrimination by demonstrating that a vertically integrated programmer has provided a "competing distributor" with more favorable terms. 47 CFR § 76.1003(c)(viii). The Commission, in recognition of the Congressional determination that distributors using alternative

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[2] See Communications Act of 1934, § 628(a) (purposed of section is to increase availability of satellite cable programming and to spur development of new communications technologies).

technologies may have been subject to certain practices designed to limit their ability to compete with cable operators, has propounded an expansive definition of "competing distributor" for purposes of bringing a complaint under new Section 76.1002. 47 CFR § 76.1002; see Order at ¶ 96. Specifically, in order to bring a complaint, a distributor need only demonstrate that "there be some overlap in actual or proposed service area" with another distributor that the complainant believes has received a more favorable contract than the complainant. Id. at ¶ 125 (emphasis added).

This generous (but, fundamentally, artificial) definition of competition was devised primarily to make it easier for alternative technology distributors to bring complaints of discrimination. In contrast, cable operators, except in the most limited circumstances, have not been found to have been subjected to similar constraints in their attempts to acquire programming.

Accordingly, the lenient standard adopted to aid alternative technology distributors to bring a claim of discrimination should not be available to cable operators. To do so would allow a cable operator who has entered into an agreement with a programmer on an arms-length basis and then found that a neighboring cable operator has been able to negotiate more favorable terms, to get out from under its bargain merely by "overbuilding" (or even proposing to overbuild) a small portion of that neighboring system and bringing a complaint under the

rules. Thus, assuming the cable operators were "similarly situated," the complainant cable operator would be able to obtain terms that it was unable to negotiate in the open marketplace. This result should not be countenanced -- much less encouraged -- by the rules.

In order to preclude this unwarranted result, Discovery submits that a cable operator seeking to bring a complaint of discrimination should be required to demonstrate that there is "substantial" overlap (e.g., 50% of each distributor's service area) with the distributor that the cable operator claims has received more favorable price, terms, or conditions. In this way, the Commission can preclude cable operators from gaining benefits unintended by the Act while ensuring that the rare cable operator who may have been subject to discrimination (such as a true overbuilder) will be able to bring a complaint.

III. The Commission Should Take Further Steps to Ensure That Complainants Are Not Able to Use the Complaint Process to Gain Access to Confidential Information

The Commission properly has determined that programmers submitting contracts or other proprietary information in response to a complaint brought under new Section 76.1003 should be able to request confidentiality to prevent widespread access to the information. See Order ¶ 78 n.103, 130. While Discovery applauds the Commission's recognition of the potential harm to

programmers in submitting this confidential material, it believes that additional restrictions should be available.

Specifically, Discovery submits that, upon proper justification, a programmer should be able to restrict access to certain proprietary information to the complainant's attorneys or the Commission's staff. Some information is simply so sensitive that a complainant's access will have an adverse effect on the programmer in future business dealings with the complainant. Although Discovery agrees that complainants should be able to establish their case to receive redress, the complaint process should not allow complainants to gain an unfair advantage in future business dealings with the programmer. Restricting access, upon good cause shown, to the complainant's attorneys or the Commission's staff, will allow both objectives to be achieved. Accordingly, Discovery requests that the Commission specify that, in making a confidentiality request, a programmer can seek to preclude the complainant (as distinguished from its attorneys) from viewing confidential or proprietary information.

IV. [redacted]

accordingly, have been required to bring existing contracts into compliance within 120 days of the effective date of the new rules. See 47 CFR § 76.1002(f); see also Order at ¶ 122.

As set forth in the comments of numerous parties, however, the prospective application of the rules to existing contracts will cause a significant and fundamental disruption to the program supply contracts into which programmers have entered. See, e.g., Reply Comments of Liberty Media at 33-34; Comments of Time-Warner at 32; Comments of Viacom International Inc. at 31. These contracts are generally long-term in nature and are premised on the amount of revenues that the programmer anticipates that it will receive from its distributors. These revenue estimates are based, of course, on the existing contracts that programmers have with their distributors. Any decrease in those projected revenues could cause the programmer to default on its obligations to program suppliers.

Balanced against this potential harm to programmers, the Commission has placed the interests of alternative technology distributors in gaining access to programming at fair and reasonable prices, terms and conditions. Order at ¶ 121. In requiring that existing contracts be brought into compliance with the rules, the Commission determined that the interests of distributors outweighed those of the programmers. Discovery submits, however, that there is a middle ground that will both satisfy the Act's requirement to protect the needs of alternative

technology distributors and protect the investment of programmers -- in addition to avoiding the administrative and logistical nightmare of re-evaluating and reforming existing contracts in an exceptionally limited time frame.

Obviously, an alternative technology distributor with an existing program contract has not been "denied access" to the programming in question. Rather, the only concern is whether the price, terms or conditions of that access are discriminatory. Generally, Discovery, which has actively marketed its services to alternative technology distributors, believes that the terms upon which its services have been sold have been fair and reasonable. Widespread forced modifications of these contracts, however, could cause Discovery to lose significant amounts of projected revenue -- losses that could affect its ability to meet its commitments to program suppliers.

Accordingly, Discovery proposes the following. Any distributor seeking to alter the terms of an existing contract based upon a claim under Section 628(c) should be required to demonstrate that the price, terms, or conditions of its access are such that the "purpose or effect" is to significantly harm the distributor's ability to compete in the marketplace. In this way, only the contracts that truly create a potential for harm will need to be reformed. Other agreements can be brought into strict compliance with the rules as they come up for renewal. The alternative technology distributor will not be harmed as it

will be ensured continued access to programming upon such terms and conditions that do not harm its ability to compete. Programmers will be helped by being able to fulfill their commitments and to make future plans based on realistic estimates of projected revenue. Consumers will also benefit by having the ability to choose among competitive distributors without endangering the viability of the program services that they desire to see. Accordingly, Discovery submits that the Commission should require distributors seeking the reformation of an existing contract to demonstrate that its ability to compete ha been harmed as a result of the price, terms or conditions of its agreement.

V. The Commission Should Find that Limited Marketing and Technology Experiments and Demonstrations are Not Subject to the Rules

The Commission's program access rules are written broadly to apply to virtually any offering of service. Discovery submits that such an approach could destroy the value of test marketing and requests that the Commission recognize that marketing and technology experiments and demonstrations are not subject to the rules.[3]

As new technologies allow distributors to increase the number of services provided and alter the manner in which

[3] Of course, if a particular test did not fit precisely within the parameters, the proponent should still be able to seek authority to conduct the test upon good cause shown.

subscribers interact with those services, a programmer's ability to test various program services and technologies designed to allow subscriber interaction takes on paramount importance. The need to structure and conduct such tests on an expedited basis to keep pace with these changes is equally important. Forcing a programmer to seek approval in each instance it desires to conduct such a test could have a negative impact on the deployment of these services and technologies. Accordingly, Discovery submits that the Commission should find that marketing and technology experiments and demonstrations are not subject to the rules.

VI. Conclusion

Accordingly, Discovery respectfully requests that the Commission reconsider, or clarify, its decision in this proceeding in the manner set forth above.

Respectfully submitted,

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